UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/630
18 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 630

Case No. 533: KOFI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Ioan Voicu; Mr. Mikuin Leliel Balanda;

Whereas at the request of Tetteh A. Kofi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 July, 30 September, 31 October and 30 November 1992, 15 January and 31 January 1993, the time-limit for the filing of an application to the Tribunal;

Whereas, on 28 January 1993, the Applicant filed an application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 519, rendered by the Tribunal on 29 May 1991;

Whereas the application contained pleas which read, in part, as follows:

> "The Applicant respectfully requests the Administrative Tribunal:
>
> A. Preliminary Measures
>
> (1) To direct the Respondent to obtain and furnish the Applicant with the following vital documents:
>
> ...

B. Substantive Measures

...

(3) To review his case No. 533 and to revise its Judgement No. 519, Kofi (1991), pursuant to article 12 of the Statute of the Tribunal, in view of the fact that the said Judgement evidently reflects gross errors of facts and omission of certain vital facts, ...

...

(7) To order the Respondent, pursuant to article 9 of the Statute of the Tribunal:

(a) To pay the Applicant appropriate and adequate compensation for the financial loss suffered by him as a direct consequence of the unilateral abrogation of the legally binding contract of September 1983, between him and the Governing Council of IDEP [African Institute for Economic Development and Planning], namely:

..."

Whereas the Respondent filed his answer on 15 April 1993;

Whereas, in a communication dated 8 November 1993, the Applicant requested a postponement of his case, which the Tribunal rejected on 18 November 1993;

Whereas the facts in the case have been set forth in Judgement No. 519;

On 28 January 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant has discovered vital documents in his official status file, which he did not know existed and which were not known to the Tribunal when it rendered Judgement No. 519.

2. The Tribunal's decision was based entirely on gross errors of fact and omission of vital facts.

Whereas the Respondent's principal contentions are:

1. The application for revision fails to introduce any fact of a decisive nature which was unknown to the Tribunal at the time of the judgement.

2. The Applicant's substantive claim is res judicata.

The Tribunal, having deliberated from 25 October to 18 November 1993, now pronounces the following judgement:

I. By his application of 26 January 1992, the Applicant asked the Tribunal for a revision of Judgement No. 519, rendered by the Tribunal on 29 May 1991, alleging that the said judgement reflects gross errors of fact and the omission of certain vital facts. In addition, the Applicant reargues the substance of his case, seeking monetary compensation, requests that oral proceedings be held and asks the Tribunal to direct the Respondent to furnish supplementary documents.

II. The Tribunal considers that the material before it is adequate to decide this case. It therefore denies the request for oral proceedings and for supplementary documents.

III. The Tribunal notes that, in effect, the Applicant seeks to obtain the revision of Judgement No. 519, under article 12 of the Statute of the Tribunal. As stated in Judgement No. 303, Panis (1983), paragraph I, "the Statute ... balances the need for finality of judgements with the requirement of fairness in a particular case where, without negligence, a 'decisive factor' is discovered after the delivery of a judgement. The standards contained in article 12 are accordingly relatively strict and lay a substantial burden upon a party who requests revision."

IV. Further, the Tribunal has held in Judgement No. 177, Fasla (1973), paragraph VI, that article 12 of its Statute "makes it possible to challenge a judgement which was given on the basis of

erroneous or incomplete facts, provided that the facts invoked by the party claiming revision were unknown to the Tribunal and to that party when the judgement was given and that these facts are of such a nature as to be decisive factors." That view was reiterated, inter alia, in Judgement No. 585, Pappas (1992), paragraph III and is consistent with the jurisprudence of the Tribunal which acknowledges that its powers of revision are strictly limited by its Statute and cannot be enlarged or abridged by the Tribunal.

V. In his conclusion and pleas, the Applicant submits that the critical facts presented by him clearly demonstrate that he became a "victim" of "obstruction of justice" caused by the Administration, as well as of "denial, failure and miscarriage of justice" caused by the IDEP and ECA Administrations in the first instance, and thereafter by the Representative of the Secretary-General, by the Joint Appeals Board, by the Office of Legal Affairs as the Respondent before the Tribunal, and above all, by the Tribunal itself". The Applicant asks the Tribunal "to grant him specific relief as requested in his pleas, pursuant to article 9 of its Statute, in the cause of equity and justice".

VI. The Applicant made considerable efforts to collate numerous documents containing material of a predominantly factual nature, to advance interpretations of his claims by certain individuals. Nevertheless, the Tribunal finds that, in reality, the main purpose of the pleas submitted by the Applicant is merely to reargue issues involved in the proceedings which led to Judgement No. 519.

VII. In this context, the Tribunal recalls its views as expressed in Judgements No. 497, Silveira (1990), paragraph XV; No. 503, Noble (1991), paragraph II and No. 585, Pappas (1992), paragraph VI, that "attempts to reargue issues already decided by [the Tribunal] and which are res judicata" are considered to be "improper" and an "abuse" of the Tribunal's procedure.

VIII. In addition, the Tribunal notes that the Applicant requested review of Judgement No. 519, by the Committee on Applications for Review of Administrative Tribunal Judgements, which considered the Applicant's case and decided that there was not a substantial basis for the application, under article 11 of the Statute of the Administrative Tribunal.

IX. The Tribunal concludes that the Applicant has failed to establish,within the meaning of article 12 of its Statute, the existence of any new fact of a decisive nature, unknown to him and to the Tribunal when Judgement No. 519 was rendered, that would warrant revision of the judgement. Nor has the Applicant shown any clerical or arithmetical mistake in the judgement, or errors arising therein from any accidental slip or omission, that would warrant any correction of the judgement.

X. For the foregoing reasons, the application is rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Ioan VOICU
Member

Mikuin Leliel BALANDA
Member

New York, 18 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary

AT

UNITED
NATIONS

Administrative Tribunal

Distr.
LIMITED

AT/DEC/631
19 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 631

Cases No. 673: HEAPS 1
No. 681: HEAPS 2

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Francis Spain;

Whereas at the request of Erick Heaps, a former staff member of the International Maritime Organization (hereinafter referred to as IMO), the President of the Tribunal, with the agreement of the Respondent, extended to 15 June 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 17 June and 14 July 1992, the Applicant filed two applications (the first and the second application), requesting the Tribunal, in the first application, to:

"rule as follows:

(a) That the Applicant's adverse comments on his periodic performance report for the period 1 May 1990 to 28 February 1991 ... deserve[d] ... a specific and circumstantial answer on behalf of the Respondent;

(b) That the contested periodic report was of doubtful validity because the Applicant had never received a job description...;

(c) That, ..., the Head of the Printing Section and the Director of the Conference Division, ..., should have initiated an inquiry at an early stage if his performance was found to be

unsatisfactory instead of waiting until the first periodic report was due and only at that stage making a series of complaints, not previously discussed with the Applicant, about the quality and quantity of his output, his attitude, and other matters, based largely on written reports which the Applicant was not shown...;

(d) That the Applicant was denied due process in his internal appeal, in particular because the Joint Appeals Board:

(i) interviewed his supervisors in his absence and without his knowledge;

(ii) received and examined documents provided by the Head of the Personnel Section none of which were shown to the Applicant until some of them were produced by the [Joint Appeals] Board at the oral hearing ...;

(iii) did not ... ask the Respondent to reply to the appeal or to comment on the Applicant's allegations of inaccuracy, unfairness and bias in his performance report;

(e) That the Respondent was remiss in failing to ... withdraw the contested periodic report and replace it by a more objective one...

...

(g) That the Applicant should be paid by the Respondent a sum equal to one year's net base salary as compensation for the injury he has suffered."

and in the second application:

"to rule as follows:

(a) that the decision by the Respondent not to renew the Applicant's second contract, ..., was procedurally and administratively defective and must be set aside...;

(b) that the Applicant was denied due process in his internal appeal, in particular because the Joint Appeals Board:

(i) did not ask the Respondent to reply to the appeal;

(ii) made its recommendation to the Respondent on the substance of the appeal without having addressed itself to the merits of the Applicant's arguments...;

...

(d) that the Applicant should be paid ... a sum equal to two years'net base salary as compensation for the injury he has suffered."

Whereas the Respondent filed his answer on 10 November 1992, requesting that cases No. 673 and No. 681 "be joined for purposes of adjudication";

Whereas the Applicant filed written observations on 29 January 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of IMO on 1 May 1990, on a one year fixed-term appointment at the G-6, step III level, as a Machine Operator in the Printing Section of the Conference Division.

The Applicant's performance during the period 1 May 1990 through 28 February 1991, was evaluated in a performance evaluation report dated 4 April 1991, prepared by his supervisor, the Head, Printing Section. The Head, Printing Section, stated, in part, that the Applicant "had a wide range of experience in all types of work and printing presses". It was expected that he "would be able to pass on his trade experience to IMO trained printing staff, he was to be our leading printer and it was for these reasons he was given a high grade and step." He added:

"...To date [the Applicant] has yet to reach the standard required of him in quality of work, quantity of work and his attitude towards it, his performance is very disappointing. ...

> I would therefore only recommend a further six months of contract without continuation unless a dramatic improvement takes place."

The Director, Conference Division, who acted as Second Reporting Officer, rated the Applicant as "a staff member who maintains only a minimum standard" and stated that he supported "the recommendation concerning the extension of [the Applicant's] contract for six months only, with the hope that his performance will greatly improve during this period."

On 15 April 1991, the Applicant, in accordance with paragraph 10 of PER/G/72/190, wrote to the Director of the Administrative Division, through the Head of the Printing Section and the Director of Conference Division, contesting the ratings in his report and requesting that the report be "withdrawn" from his personnel file and "replaced with an objective assessment" of his work. In a reply dated 6 June 1991, the Head, Personnel Section, informed the Applicant that the Secretary-General had listed in an attachment "those areas of your performance requiring improvements within the period of your current contract" and informed him as follows: "your performance will be assessed on a monthly basis and you will be advised in each case with regard to the status thereof."

On 20 June 1991, the Applicant sought clarification of the administrative decision contained in the communication of 6 June 1991. On 10 July 1991, the Head, Personnel Section, informed the Applicant that since he had acted in accordance with the requirements of PER/G/72/190 "the question of withdrawing the Report and issuing a new one does not arise". On 31 July 1991, the Applicant requested the Secretary-General to review the decision not to remove his performance evaluation report from his personnel file. On 23 August 1991, the Head, Personnel Section, informed the Applicant that the decision would be maintained.

On 18 September 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 24 October 1991. Its findings and recommendations read, in part, as follows:

"5. The Board is unanimous in its surprise at the apparent absence of direct, constructive and timely discussion between the supervisors and [the Applicant] concerning deficiencies raised in the periodic report...

6. The Board believes that more open, frank and timely discussion between the supervisors and [the Applicant] --i.e. better techniques for resolving operational problems-- as regards the day-to-day performance of the latter would have prevented what now amounts to unverifiable and greatly divergent claims and counter-claims...

...

8. The Board feels that, regardless of the merits of claims and counter-claims by the parties concerned, it is inappropriate to blame [the Applicant] for not having lived up to expectations which were not made clear to him in an objective and verifiable manner (...).

9. In this connection the Board also believes that ... a timely and thorough assessment of reference letters received from [the Applicant's] previous employers, ... would have led to a more judicious selection of a candidate for the vacant post...

RECOMMENDATIONS

A. Taking into account the proper reporting procedures as provided in paragraph 14 of document PER/G/72/190 of 21 February 1972, the supervisor should be invited to substitute the contested report.

B. The Board also strongly recommends that the procedure regarding periodic reports be reviewed and, to this effect, that a new circular be issued taking into account the changes introduced in the structure of the Organization and the lessons learned and experience acquired over the past two decades as regards periodic reporting.

C. The Board further recommends that consideration be given to the establishment of an appropriate machinery dealing with contestations by supervisees in order to avoid a systematic recourse to the Joint Appeals Board. Such matters should be dealt with at the operational level.

D. The Board recommends with emphasis that supervisors in the Secretariat and relevant staff in Personnel Section be allowed to benefit from the variety of short courses and workshops on interviewing and recruitment techniques offered by educational establishments and the personnel management industry. Courses could also be conducted in-house."

On 9 December 1991, the Head, Personnel Section transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General had decided as follows:

"(a) that the initial decision not to withdraw the report and replace it by a revised version should stand;

(b) to consider carefully, the Board's recommendation for a review of the procedures concerning periodic reporting;

(c) that inasmuch as an appropriate machinery (as specified in staff rule 111.1) already exists to consider administrative decisions contested by staff members, no new machinery should be established; and

(d) to consider carefully, the Board's recommendations concerning the training of relevant staff on interviewing and recruitment techniques."

On 12 June 1992, the Applicant filed with the Tribunal the first application.

In the meantime, the Applicant's appointment had been extended for a further fixed-term period of six months, through 31 October 1991. On 3 October 1991, the Director, Administrative Division, informed the Applicant as follows: "I have been informed by the Head, Printing Section and the Director, Conference Division, that the improvement looked for in your performance has not taken place. Accordingly, I regret to inform you that, as stipulated in staff rule 109.6 (...your present appointment, which expires on 31 October 1991, will not be renewed." He attached to the

communication a performance evaluation report, on the Applicant's services from 1 March to 30 September 1991, in which the Applicant had been rated, "on the whole, an unsatisfactory staff member". The Director, Conference Division, in his general comments, stated that, to his regret, the Applicant had "not shown to his direct supervisors that he can make a positive contribution to the work of the Section."

On 10 October 1991, the Applicant requested the Secretary-General to review this decision. In a memorandum dated 24 October 1991, the Director, Administrative Division, informed the Applicant that his appointment would not be extended. On 21 November 1991, the Applicant lodged a second appeal with the Joint Appeals Board (JAB) against this administrative decision. The Board adopted its report on 31 March 1992. Its findings and conclusions read as follows:

> "The Board made a thorough examination of the documents at hand and in accordance with staff rule 109.6(a) ('Expiration of Fixed-Term Appointments') it is apparent that the Administration's actions are in conformity thereto.
>
> The Board concluded that the appellant had no legal expectancy of renewal. Fixed-term appointments do not carry any right of renewal. Staff rule 109.6(a) is very clear and the letter of appointment signed by the appellant confirms this position.
>
> Accordingly, the Board agrees with the Administration's decision not to renew the fixed-term contract of [the Applicant] which expired on 31 October 1991."

On 27 April 1992, the Head, Personnel Section transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General "accepts the Board's findings...".

On 17 July 1992, the Applicant filed with the Tribunal, the second application.

Whereas the Applicant's principal contentions are:

1. The Applicant's performance evaluation report for the period 1 May 1990 to 28 February 1991 was thoroughly inaccurate, unfair and biased.

2. The standards by which the Applicant was judged were inappropriate since they were based on assumptions about his role, of which he was not informed until after the report had been prepared. The job description with which the Applicant had been furnished did not specify such requirements.

3. The report was prepared with a view to terminating the Applicant's employment. At no time did the Head of the Section make contact with the Applicant about his work.

4. The Applicant had a legitimate expectancy that his performance, if properly assessed, would lead to a renewal of his contract.

Whereas the Respondent's principal contentions are:

1. The evaluation of the Applicant's performance was in accordance with the facts and not influenced by a desire to separate the Applicant from service.

2. The Applicant was given ample opportunity to improve his performance and failed to do so, despite being advised of the consequences.

3. There were no procedural defects in dealing with the Applicant's evaluation and separation.

The Tribunal, having deliberated from 3 to 19 November 1993, now pronounces the following judgement:

I. By common consent, the Tribunal joins the two cases: a single judgement will therefore cover both.

II. The first issue raised by the Applicant (case No. 673) relates almost entirely to the assessment of his work, prepared on 2 April 1991, for the period of 1 May 1990 to 28 February 1991. It

contained a recommendation by the Applicant's Supervising Officer (Head, Printing Section, Conference Division) that the Applicant, whose one-year fixed-term contract was to expire on 30 April 1991, should be given a further "six month contract without continuation unless a dramatic improvement takes place". This recommendation was supported by the Director, Conference Division, who described the Applicant as a staff member "who maintains only a minimum standard".

III. On 15 April 1991, in a memorandum to the Director, Administrative Division, the Applicant described this report as "thoroughly inaccurate, unfair and biased". He commented on all aspects of it in order to sustain and substantiate his criticisms and objections. His main plea was that since he was never told what were his duties, functions and responsibilities, it was utterly unjust and unfair to assess his work as falling short of the expectations of his supervising officers.

IV. The Tribunal has examined all the evidence in this context and finds that, on numerous occasions, the Applicant was made aware of his duties and of what was expected of him. Thus, in a letter dated 11 April 1990, sent to him by Head, Personnel Section, which offered him the appointment in the Printing Section, his attention was specifically drawn to Vacancy Notice No. G.S.90-1 issued on 15 February 1990 (the same date when a short advertisement for the job appeared in the newspaper "Daily Mail"). In the Vacancy Notice, the "main duties and responsibilities" were described and "qualifications and experience" required of candidates were also indicated. The Applicant accepted the appointment on 18 April 1990.

The Applicant now contends that he did not receive a copy of the Vacancy Notice. In the view of the Tribunal, he could have obtained it at any time after 11 April 1990, when he received the offer of the appointment.

V. Thus, the Tribunal cannot entertain the Applicant's assertion that he was wholly unaware of what his duties and responsibilities were. This conclusion is strengthened by a memorandum to the Director, Conference Division sent to him on 15 April 1991. This memorandum shows that the Applicant had several discussions, by telephone or otherwise, about the nature of his work and about the terms and conditions of his appointment. He was also supplied with appropriate documents; his tenure was clearly for a fixed-term of one year, beginning 1 May 1990.

VI. The Tribunal notes that the Applicant went on to urge, that in view of the rebuttal he had sent to the Director, Administrative Division on 15 April 1991, his adverse performance report for work during 1 May 1990 to 28 February 1991, should be "withdrawn and replaced with an objective assessment of my work and a realistic assessment of my competence and potentialities". In reply, the Respondent drew the Applicant's attention to the Secretary-General's memorandum No. PER/G/72/190 dated 21 February 1972 and declined to withdraw the report. The relevant section of this memorandum reads:

> "10. If a staff member so wishes, he may, not later that ten working days after signing the report, submit a written statement containing explanations or counter-comments on part or on all of the report. This statement will be submitted through the staff member's reporting officers to the Head of Administrative Division for inclusion, with the report to which it relates, on the staff member's personal file".

VII. The Tribunal cannot take exception to the measure adopted by the Respondent, but notes that in the United Nations the procedure for handling rebuttals of adverse performance reports is in many respects different and would seem to offer more protection to staff.

VIII. On the Secretary-General's declining to withdraw the report in question, the Applicant took his case to the Joint Appeals Board (JAB), which recommended on 24 October 1991, that the Supervisor of

the Applicant's work "should be invited to substitute the contested report". The Respondent did not accept this recommendation and adhered to his earlier decision that both the adverse report and the Applicant's rebuttal should be preserved in the Applicant's personnel file, in accordance with PER/G/72/190 of 21 February 1972.

IX. The Tribunal notes that before taking these decisions, the Respondent consulted his Legal Office on 9 August 1991 and 8 November 1991. On both occasions, he was advised against withdrawing or replacing the contested report. On 9 August 1991, the Legal Office cited the rule quoted above and on 8 November, it advised inter alia:

> "5. The report can only be withdrawn where it has ben proved to be an inaccurate assessment.
>
> 6. The APB-GS (Appointment and Promotion Board - General Service) to which the matter was referred initially did not find the assessment inaccurate. Rather they recommended that the administration establish guidelines and targets for monitoring of [the Applicant's] performance".

X. The Tribunal notes that on 18 April 1991, the Appointment and Promotion Board - General Service (APB-GS) reviewed the case "extensively" and recommended a six-months extension of the contract and "that the incumbent be informed of the targets he would have to fulfil over the next six months, it being understood that the Personnel [Section] would be involved in the setting of the targets and the monitoring of performance, preferably at monthly intervals. The results of these assessments would be communicated to the incumbent".

XI. These recommendations were accepted by the Respondent. On 6 June 1991, the Head, Personnel Section, conveyed to the Applicant a list of "those areas of your performance requiring improvements within the period of your contract". He concluded: "Accordingly, your performance will be assessed on a monthly basis and you will be

advised in each case with regard to the status thereof". Other steps were discussed "regarding the help we can give to [the Applicant] to reach a satisfactory standard of production". In practice, the monthly reports envisaged by the APB and accepted by the Respondent, were not prepared. On 5 August 1991, the Head, Printing Section, reported to the Head, Personnel Section, as follows:

> "With regard to the monthly reports on the performance of [the Applicant] I regret to say that as yet I have been unable to assess him constructively.
>
> For the month of May he was on annual leave for 5 1/2 days plus 2 days sick leave. For the month of June the Printing Section was subjected to a major reorganization and virtually nothing was printed and for the month of July he was on sick leave for the whole of the month".

XII. Finally, a second report was prepared on the Applicant's work for the period of 1 March to 30 September 1991. As a result, a further extension was denied. The Applicant's fixed-term contract expired on 31 October 1991.

XIII. There is, one aspect of this case which has caused the Tribunal some concern. Part G of the Applicant's performance report was not completed. Like the APB-GS the Tribunal finds that the lack of "internal communication between the staff member and his supervisor and colleagues" could and should have been avoided. The omission to fill in Part G cannot be considered sufficient to impugn the Respondent's conclusions about the continued employment of the Applicant, but it does, in the opinion of the Tribunal, reflect adversely on an Administration which failed to observe its own rules.

XIV. The Tribunal, however, cannot sustain the plea that the Applicant was wrongly assessed or that the Respondent abused his discretionary power or that he was acting in "an arbitrary,

unreasonable and inconsiderate manner". The Tribunal notes that the Applicant was given six months to improve his performance which was reviewed by the APB-GS in April 1991 and finally by the Director, Conference Division, on 25 September 1991.

XV. The second case (No. 681) is essentially a continuation of the first case discussed above. The Applicant states in his rebuttal letter dated 15 April 1991, that the first adverse report of 2 April 1991, was "deliberately designed to prepare the ground for the termination of my service in six month's time". He argues that if his work had been fairly assessed during his one year fixed term contract, he would have had a legal expectancy for the renewal of his contract. As such an expectancy could no longer be fulfilled, as a "practical proposition", he should be paid "sum equal to two years' net base salary as compensation for the injury suffered".

XVI. The Tribunal has consistently held that holders of fixed-term contracts do not have an automatic right to an extension of their contracts. Performance assessment of staff constitutes one of the factors to be considered in extending fixed-term contracts. The Tribunal has established jurisprudence that in considering whether there was an expectancy of the extension of such contracts, the totality of circumstances should be taken into account. In the present instance, the service of the Applicant was for a period of 18 months. The Respondent had made it clear in his letter, offering the appointment, that "the post will be financed from the Printing Fund and has been established initially until 31 December 1991 ... continuation of the post beyond that date will depend on the decision which may be taken by the Council and Assembly".

XVII. In these circumstances, the Tribunal cannot find any reason why the Respondent should take recourse to devious methods, as repeatedly alleged by the Applicant, to separate him, when in terms of staff rule 109.6, and under the circumstances of this case, he

had complete freedom to allow a fixed-term contract to lapse on the specified date of expiration and without prior notice.

XVIII. In addition, the Tribunal finds, that apart from some hints of a cool relationship between the Applicant and his supervisor, the Head of Printing Section, Conference Division, there is no indication of any bias or prejudice.

XIX. Finally, the Tribunal finds that while there are features in this case which were not completely in keeping with the existing Rules and Regulations, they do not vitiate the decisions of the Respondent not to withdraw or replace the adverse report on the Applicant's work from April 1990 to February 1991 and, not to extend his fixed-term contract beyond 31 October 1991.

XX. For the foregoing reasons the application is rejected.

(Signatures)

Samar SEN
President

Mikuin Leliel BALANDA
Member

Francis SPAIN
Member

New York, 19 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary

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AT/DEC/632
19 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 632

Case No. 686: MUGHIR

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Ioan Voicu;

Whereas at the request of Randa Mughir, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 September 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 19 August 1992, the Applicant filed an application requesting the Tribunal, inter alia:

"to find that:

(a) Applicant had not been afforded 'every reasonable consideration' for a career or indefinite appointment, and had, therefore, been denied fair treatment and due process;

(b) Applicant's post was fictitiously discontinued ... in order to provide a rationale for her termination;

(c) The decision to abolish the Applicant's post and to terminate her was, therefore, tainted by improper motives;

(d) Applicant was unfairly deprived of consideration for the payment of an SPA [special post allowance] ...;

(e) The delay in and the nature of the Administration's reaction to the Discrimination Panel's reports amounted to unfair treatment of the Applicant;

(f) Therefore, the indemnity recommended by the JAB [Joint Appeals Board] in para.7 31(d) of its report ... is grossly insufficient;

(g) That the Secretary-General failed to honour his solemn commitment ..., to implement all unanimous JAB recommendations, provided that they do not impinge on any major question of law of principle.

And consequently to order that:

(a) Applicant be reinstated as from 1 January 1991, with full retroactive payment of salary and allowances;

(b) In the event that the Secretary-General chooses not to reinstate her, and in view of this case's exceptional circumstances: Applicant be paid the monetary equivalent of three years' net salary plus the termination indemnity to which she would have been entitled had she held an indefinite appointment; and Applicant be given a recommendation enabling her to compete in the job market;

(c) Applicant be paid a sum corresponding to an SPA from G-6 (Washington) to P-2 for the period from the date of resignation of the Professional Officer-in-Charge of the Unit (...) until the day of the Applicant's reinstatement;

(d) Applicant be paid an indemnity double the amount recommended by the JAB ($30,000.00 instead of $15,000.00) for the injury suffered as a result of the Administration's failure to deal promptly and adequately with the Discrimination Panel's reports."

Whereas the Respondent filed his answer on 18 December 1992;

Whereas the Applicant filed written observations on 22 February 1993;

Whereas, on 9 and 21 October 1993, the Applicant submitted an additional document;

Whereas, on 28 October 1993, the Tribunal put questions to the Respondent and on 2 November 1993, he provided answers thereto;

Whereas, on 4 and 11 November 1993, the Applicant submitted his comments on the Respondent's answers to the questions put by the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 22 September 1975. From 1975 to 1977, she served on different short-term appointments at the G-3 level, as Assistant Conference Officer, with the Department of Conference Services. On 15 December 1980, she was recruited on a three-month fixed-term appointment at the G-3 level, as an Editorial Clerk in the Development Forum (later - Development Business) Unit of the Department of Public Information (DPI), in Washington, D.C. The Applicant continued to work in this Unit, serving on a series of fixed-term appointments of varying length, until her separation from the United Nations on 31 December 1990.

On 27 June 1984, the Applicant wrote to the Assistant Secretary-General for Personnel Services, complaining, inter alia, about her lack of promotion in spite of the recommendations by her supervisor and about the absence of a job description, indicating her duties. She also expressed her concern about the possibility of the abolishment of her post. She sought advice "on procedures for recourse action and redress of grievances for a staff member in my unique position."

In a reply dated 31 July 1984, the Applicant was informed by a Personnel officer that she would be promoted to the G-4 level and that DPI was preparing her job description. In addition, he confirmed "regarding the proposed abolition of [her] post" that DPI intended "to redeploy [her] post from Washington to NY" and she would be "given the choice of relocating to New York in order to continue with [her] employment". If she did not agree, her fixed-term appointment would not be extended. The Applicant was promoted to the G-4 level, as Senior Editorial Clerk, with effect from 1 April 1984. However, the job description was not prepared, nor does the file indicate that she was asked to transfer to New York.

On 22 October 1984, the Applicant again wrote to the Assistant Secretary-General for Personnel Services to complain about the "abuse of authority" by her direct supervisor, the Associate Information Officer, a P-2 staff member in charge of the Unit, and the absence of a job description.

On 25 July 1986, the Applicant filed a complaint with the Panel on Discrimination and Other Grievances (the Panel on Discrimination) complaining of abuse and harassment by her supervisor, absence of a job description and of her general contractual situation.

On 13 November 1987, the Applicant was retroactively promoted to the G-5 level, with effect from 1 April 1985 and to the G-6 level, with effect from 1 April 1986, on conversion to the new classification standards approved by the General Assembly, upon the recommendation of the International Civil Service Commission. Her functional title was changed to Editorial Assistant.

On 30 November 1987, the Associate Information Officer who had been in charge of the Unit and who was the Applicant's supervisor, separated from the UN, and was not replaced. The Applicant became the senior officer of the Unit and her functional title was changed to "Officer-in-Charge", with effect from 14 June 1989.

On 14 August 1990, the Applicant again wrote to the Panel on Discrimination reiterating the contents of her earlier memorandum of 25 July 1986.

On 31 October 1990, the Co-ordinator of the Panel on Discrimination, wrote to the Assistant Secretary-General, Office of Human Resources and Management[1], conveying, inter alia, the Panel's opinion that the Applicant was kept on short-term extensions of fixed-term appointments "unnecessarily and unfairly as a means of punishment for complaining about her status." It therefore, recommended that the Applicant "be granted an immediate indefinite appointment in Washington".

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[1] Successor of the Office for Personnel Services

On 25 October 1990, the Director, Information Products Division, DPI, wrote to the Editor-in-Chief, Development Forum, DPI, informing him that, given the severity of the financial situation of the Development Forum Trust Fund it had been decided, inter alia, to eliminate two posts in the liaison office in Washington, the P-2 previously encumbered the Applicant's supervisor and the G-6 post encumbered by the Applicant.

On 5 November 1990, the Executive Officer, DPI, informed the Applicant as follows:

> "I am ... writing to advise you that the post you are currently encumbering under the present staffing table has been designated as a post to be discontinued. Although no prior notice is required under the terms of your appointment and Staff Rule 109.7(a), I regret to inform you that the Department of Public Information is not in a position to extend your fixed-term appointment beyond 31 December 1990.
>
> You will note that the functions of the remaining lower level General Service post in Washington will be revised and, as a consequence, this post will be advertised. Should you be interested in applying and being considered for it along with other candidates, you may do so, subject to your confirmation in writing of your willingness to accept a lower grade than your present personal grade".

The Applicant did not apply for the above post and separated from service on 31 December 1990.

On 30 April 1991, the Applicant requested administrative review of the decision to abolish her post. Having received no reply, on 9 July 1991 and 21 August 1991, respectively, the Applicant lodged an appeal to the Joint Appeals Board (JAB). The Board adopted its report on 31 March 1992. Its conclusions and recommendations read, in part, as follows:

"Conclusions and recommendations

30. ...

(a) Appellant had not been afforded "every reasonable consideration" for a career or indefinite appointment, and had, therefore, been denied fair treatment and due process;

(b) Appellant's post was fictitiously discontinued, not - as alleged by Respondent - for financial reasons, but in order to provide a rationale for her termination;

(c) Appellant was unfairly deprived of consideration for the payment of an SPA;

(d) the delay in and the nature of the Administration's reaction to the Grievance Panel's Report amounted to unfair treatment of the Appellant."

Recommendations

"31. ...

(a) Appellant be reinstated as from 1 January 1991, with full retroactive payment of salary and allowances;

(b) in the event that the Secretary-General chooses not to reinstate her, Appellant be paid the monetary equivalent of two years' net salary plus the termination indemnity to which she would have been entitled had she held an indefinite appointment;

(c) Appellant be paid a sum corresponding to an SPA from G-6 (Washington) to P-2 for the period from the date of resignation of [the Associate Information Officer] until the termination date of Appellant's appointment; and

(d) Appellant be paid an indemnity for the injury suffered as a result of the Administration's failure to deal promptly and adequately with the Grievance Panel's reports. ... The Panel recommends that Appellant be paid the sum of $5,000.00 if she is reinstated and $15,000.00 if she is not.

32. The Panel makes no further recommendation with respect to this appeal."

On 8 July 1992, the Assistant Secretary-General for Human Resources Management transmitted to the Applicant copy of the JAB report and informed her that the Secretary-General, after considering the report, had decided:

> "... to reaffirm that the reorganization of offices within the Secretariat is within his discretionary authority. He is satisfied that the decision to pare down the staffing of the Development Forum Unit, in Washington and New York, was justified by the critical financial situation of that Unit, which was required to be self-supporting. This situation has deteriorated since 1990.
>
> Bearing in mind that:
>
> (i) the precarious financial situation of the Development Forum/Development Business publications made it impossible to view your functions as being of a continuing nature, a prerequisite for consideration of any staff member for career appointment;
>
> (ii) in accordance with staff rule 104.12(c), no indefinite appointment can be offered unless the Secretary-General has identified a particular agency or office for that purpose, and that the office where you served was not so designated,
>
> the Secretary-General cannot accept the Board's recommendations that you be reinstated as of 1 January 1991, or be paid two years' net salary plus the termination indemnity to which you would have been entitled had you held an indefinite appointment.
>
> However, given the procedural and other shortcomings noted in your case, and the lack of clarity in the process which lead to what amounted to a termination of appointment for abolition of post, the Secretary-General has decided that your case should be treated as a termination of your fixed-term appointment. You will therefore be paid a termination indemnity in accordance with staff regulations 9.3(a) and Annex III to the Staff Regulations.

> The Secretary-General has noted that you were not considered for a special post allowance, which would have allowed for a proper assessment of the level of your functions between 1 December 1987 and your separation on 31 December 1990, and for a determination as to whether the criteria for a special post allowance were met. For that reason, the Secretary-General has decided to accept the Board's recommendation that you be paid a special post allowance from G-6 (Washington) to P-2 from 1 December 1987 until 31 December 1990.
>
> The Secretary-General has taken note of the Board's comments concerning the handling of the repeated communications from the Panel on Discrimination and Other Grievances. He regrets that the corrective measures agreed to in 1989 by the Department were either not carried out or were implemented with a considerable delay and, on that basis, has decided that you should receive a sum of $5,000 in compensation for the damage you suffered as a result. The Secretary-General also notes that the subsequent recommendations of the Panel were overtaken by events since you were separated from service after your post was abolished and you then availed yourself of the appeals process which provided the proper forum to consider your case. It is after taking into account all the circumstances of the case and the evidence before him, that the Secretary-General has taken the decisions set out above, which will compensate for any unfairness you may have suffered."

On 19 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied fair treatment and due process because she had not been afforded "every reasonable consideration for an indefinite appointment".

2. The Applicant's post was "fictitiously" discontinued not for financial reasons but to provide a rationale for her termination.

3. The decision to abolish the post was, therefore, tainted by improper motives.

Whereas the Respondent's principal contentions are:

1. The decision to abolish the Applicant's post was dictated by financial concerns. The Applicant was accorded the benefits of the Staff Regulations and Rules applicable to reduction in staff.

2. The Applicant received appropriate consideration for further appointments, given the precarious financial situation of Development Forum.

3. The Respondent sufficiently compensated the Applicant for any unfairness she may have suffered.

The Tribunal, having deliberated from 27 October to 19 November 1993, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General dated 8 July 1992, not to accept the JAB's recommendations that she should be reinstated as of 1 January 1991 and be paid two years'net salary plus the termination indemnity to which the Applicant would have been entitled had she held an indefinite appointment. Although the Secretary-General acknowledged procedural and other shortcomings in the Applicant's case and the lack of clarity in the process which led to what amounted to a termination of her appointment for abolition of post, he concluded that her case should be treated as a termination of her fixed-term appointment and that she should be paid a termination indemnity in accordance with staff regulation 9.3(a) and annex III to the Staff Regulations.

The Secretary-General accepted the JAB's recommendation that the Applicant be paid a special post allowance from the G-6 (Washington) to the P-2 level, from 1 December 1987 until 31 December 1990. He also decided that the Applicant should receive the sum of $5,000, as compensation for the damage she suffered as a result of the fact that the corrective measures agreed to in 1989 by the Administration were either not carried out or were implemented with a considerable delay.

II. The Applicant claims that she was denied fair treatment and due process because she had not been afforded every reasonable consideration for an indefinite appointment. She claims that her post was "fictitiously" discontinued, not for financial reasons, but to provide a rationale for her termination and that the decision to abolish the post was, therefore, tainted by improper motives.

III. In this regard, the Tribunal recalls that while termination of a staff member is the exercise of a discretionary power vested in the Secretary-General, it must not, however, be exercised in an arbitrary or capricious manner. In Judgement No. 347, Sabatier (1985), para. II, quoting from an earlier Judgement No. 54, Mauch (1954), the Tribunal stated as follows:

> "5. It should be noted that staff regulation 9.1(c) does not require the Secretary-General to state a specific reason or follow any particular procedure for termination of temporary-indefinite appointments. It is sufficient that the termination be found by him to be in the interest of the United Nations. While the measure of power here was intended to be left completely within the discretion of the Secretary-General, this would not authorize an arbitrary or capricious exercise of the power of termination, nor the assignment of specious or untruthful reasons for the action taken, such as would connote a lack of good faith or due consideration for the rights of the staff member involved."

IV. In the present case, the Tribunal finds that the reasons for the abolition of the Applicant's post were not fictitious but real. The cause was the continued deterioration of the critical financial position of Development Forum, which necessitated the adoption of emergency measures, including abolition of posts. In the light of the evidence produced, the Tribunal concludes that the abolition of the Applicant's post and the termination of her appointment were carried out in conformity with staff rule 109.1(c). The Tribunal notes that it was suggested to the Applicant that she apply for the remaining post in her unit, which at the time, was at a lower grade.

The Applicant chose not to do so. The Secretary-General treated her case as a termination of her fixed-term appointment and she was paid the appropriate indemnity. The decision of the Secretary-General was a valid exercise of his discretionary power and was not tainted by improper motives.

V. With respect to the Applicant's claim that she was denied fair treatment and due process because she had never been considered for a career appointment, as required by General Assembly resolution 37/126, when she completed five years of satisfactory service at the end of 1985, the Tribunal notes the JAB's conclusion that had the Applicant not been unfairly treated, she might well have been the holder of an indefinite appointment at the time DPI decided to discontinue her post, with the advantages and additional procedural safeguards of such staff.

However, the Tribunal notes that the administrative instruction ST/AI/274 invoked by the Applicant to demonstrate that she had a right to a career appointment, is applicable only to staff at Headquarters. It is not applicable to her, as she was recruited to serve outside Headquarters. Moreover, the precarious financial situation of Development Forum made it impossible for the Administration to view the Applicant's functions as being of a continuing nature to a degree warranting a career appointment under General Assembly resolution 37/126.

VI. The Applicant claims compensation for the injury suffered as a result of the Respondent's failure to deal promptly and adequately with the Panel on Discrimination's report. The Tribunal observes that the Respondent took no action in response to the Panel on Discrimination's memoranda of 14 June 1989, 31 October 1990, 26 November 1990 and 11 April 1991, until after the Applicant had been separated and had filed a request for administrative review. The two communications which were finally prepared (dated 10 June 1991 and 27 August 1991) were not seen or commented upon by the Applicant. On the basis of these communications, the Respondent

decided not to accept the recommendations of the Panel on Discrimination. In view of this delay and the denial to the Applicant of an opportunity to comment on the communications, the Tribunal finds a substantial basis for the JAB's finding that the Respondent's reaction to the requests of the Panel on Discrimination was "totally unacceptable, but also totally consistent with the cavalier manner with which [the Applicant] has been treated through most of her career."

VII. Similarly, the Tribunal notes with dismay and regret that the Applicant had to wait seven years to have her post classified and that the official job description for the post was never shown to her.

VIII. While the Tribunal is aware that the Respondent decided to pay the Applicant US$5,000 in compensation for the injury to her as a result of his handling of communications from the Panel on Discrimination, the Tribunal finds that such compensation is insufficient, given the nature and severity of the injury. In the light of all the facts and circumstances of the case, the Tribunal decides that an award of additional compensation to the Applicant is called for.

IX. The Applicant has complained about the withholding by the Respondent of a recommendation that would have enabled her to compete in the job market. As this issue was not considered by the JAB, it is not properly before the Tribunal.

X. As to the Applicant's requests made in the written observations dated 22 February 1993, for the payment of costs incurred in connection with the preparation of her case, the Tribunal declines to make any award, in keeping with its jurisprudence in Judgement No. 237, Powell (1979).

XI. For the foregoing reasons, the Tribunal orders that:

The Respondent pay US$5,000.00 to the Applicant, as additional compensation for the unfair treatment she suffered.

XII. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Ioan VOICU
Member

New York, 19 November 1993

(R) Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/633
19 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 633

Case No. 643: AL-ATRAQCHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Ioan Voicu;

Whereas, on 14 January 1992, Mohammed Ali Al-Atraqchi, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"1. To find that the recruitment of an external candidate violates staff regulation 4.4...

...

3. To find that the Applicant did not receive the fullest consideration with regard to [his] candidacy for the post D-1, Chief, Industry, Energy and Environment Statistics Branch, Statistical Office, International Economic and Social Affairs (DIESA), Post No. UNA-06540 E-D1-001.

4. To find that the Secretary-General's refusal to accept the unanimous report of the JAB [Joint Appeals Board] contradicts his commitment to accept all unanimous reports of the JAB, provided that they do not impinge on any major questions of law or principle.

5. To find that the Representative of the Secretary-General cannot introduce, through his letter to the Applicant dated 20 November 1991, a new issue (namely that ST/AI/338, Add. 5, para. 32(a),

enabled the Secretary-General to resort to external candidates) which was never submitted to the Joint Appeals Board.

6. To conclude that the selection process which awarded Mr. Osborne Jackson a promotion to D-1 was, therefore, null and void.

7. To conclude that Applicant was the most qualified of all candidates.

8. And consequently, to order:

(a) Respondent to promote Applicant to the D-1 level, retroactively to the date when Mr. Osborne Jackson was promoted to D-1.

(b) Retroactive wages and benefits at the D-1 level less wages and benefits received at the P-5 level from no later than the date of confirmation of the promotion which was denied to Applicant.

(c) Respondent to grant Applicant, in case this Tribunal does not wish to order specific performance, damages equal to two years net base salary.

(d) Additional damages for the continuous hinderance to the development of Applicant's career."

Whereas the Respondent filed his answer on 27 July 1992;

Whereas the Applicant filed written observations on 7 October 1992;

Whereas, on 4 and 16 June 1993, the Tribunal put questions to the Respondent, to which he provided answers on 8 and 21 June 1993;

Whereas, on 15 and 24 June 1993, the Applicant commented on the Respondent's submissions;

Whereas on 28 June 1993, the Executive Secretary of the Tribunal informed the parties that the Tribunal had decided to adjourn consideration of the case;

Whereas, on 19 October 1993, the Tribunal put questions to the Respondent, to which he provided answers on 22 October 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967, under a probationary appointment at the P-2 level, as an Associate Statistician, with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969, his appointment was converted to a permanent appointment and on 1 June 1970, he was promoted to the P-3 level as a Statistician. On 1 September 1973, the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs, as an Economic Affairs Officer. On 1 April 1974, he was promoted to the P-4 level and on 1 July 1979, to the P-5 level as a Senior Political Affairs Officer.

The Administration announced, in Internal Vacancy Announcement 90-M-ESA-006-NY, the vacancy of the D-1 post of Chief, Industry, Energy and Environment Statistics Branch in the Department of International Economic and Social Affairs (DIESA), with the deadline for applications being 19 March 1990. The post was advertised internally, within the Secretariat, as well as externally. The Applicant and other staff members, as well as some external candidates, applied for the post. The selection for the post was conducted under the Vacancy Management and Staff Redeployment System (VMS) established according to the Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 and administrative instruction ST/AI/338 of the same date (and its addenda).

All applications for the post of Chief, Industry, Energy and Environment Statistics Branch were forwarded to the Appointment and Promotion Board. The Board, at its 1600th meeting held on 1 November 1990, short-listed, in alphabetical order, four candidates, including the Applicant and decided that their names should be transmitted to the Department for final selection. On 4 January 1991, the Office of Human Resources Management (OHRM) informed the Applicant that, after the review by the Appointment and Promotion Board, he had not been selected for the post.

On 1 February 1991, the Applicant requested the Secretary-General to review the administrative decision of 4 January 1991, stating, inter alia, that his academic background and work experience in the Statistical Office were "superior" to those of the staff member selected for the post and that the decision not to promote him to the D-1 level against the post in question was contrary to staff regulations 4.2 and 4.4. In a reply, dated 12 February 1991, the Chief of the Administrative Review Unit, OHRM, informed the Applicant that the review he had requested would be conducted, and that, if he received no answer to this letter within a month, he could file an appeal with the Joint Appeals Board (JAB).

On 11 April 1991, having received no reply from the Secretary-General, the Applicant lodged an appeal with the JAB. The Board adopted its report on 13 November 1991. Its conclusions and recommendations read, in part, as follows:

> "Conclusions and Recommendations
>
> 23. ...the Panel concludes that, guided by the interpretation enunciated in UNAT's Judgement No. 537 (Upadhya), it cannot support the Appellant's arguments regarding the invalidity of the VMS and the review conducted in accordance therewith. Furthermore, the Panel cannot enter into the question of evaluation and comparison of the Appellant's qualifications with those of the selected candidate, nor does it find any basis for assuming that fullest regard had not been given to the candidature of the Appellant. It concludes, however, that VMS was used in this case to fill a vacancy with an external candidate which is not in line with the goals of the VMS.
>
> 24. In view of the aforesaid the Panel recommends that the Appellant be awarded a compensation corresponding to one month net salary.
>
> 25. The Panel makes no further recommendation in support of the appeal."

On 20 November 1991, the Director, Office of the Under-Secretary-General for Administration and Management, transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has decided, in accordance with such report, to maintain the contested decision. At the same time, he cannot accept the Board's recommendation for payment of one month's salary as compensation for the following reasons.

The Secretary-General may, in the interest of securing the highest standards of efficiency, competence and integrity, exercise his discretionary authority to fill a post through external recruitment. This is in accordance with staff regulations 4.2 and 4.4. The administrative instruction governing vacancy management, ST/AI/338, expressly envisages in paragraph 32 of its Addendum 5, of 2 November 1988, certain situations where posts are not to be filled through the full procedures of the vacancy management and staff redeployment programme. The procedure applied in your case is set out in subparagraph 32(a) of this Addendum and is designed to guarantee that internal candidates who may be qualified can still be considered jointly with external candidates."

On 14 January 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The selection of an external candidate for the post violates staff regulation 4.4., which establishes priority in filling vacancies for staff members already in the service of the United Nations.

2. The Applicant's candidacy did not receive the "fullest consideration", required under staff rule 104.14.

3. The Secretary-General's refusal to accept the unanimous report of the JAB contradicts his commitment to accept all unanimous reports of the JAB provided that they do not impinge on any major questions of law or principle.

Whereas the Respondent's principal contentions are:

1. The International Civil Service Commission staff is appointed by the Secretary-General; they are officials of the United Nations and therefore cannot be considered as external candidates.

2. VMS allows for recruitment and promotion of external candidates for particular posts.

3. The Applicant has no right to promotion but only to due consideration of his candidacy, which was given. Evaluation of relative merits of staff members is within the discretion of the Secretary-General.

4. The temporary suspension of staff rule 104.14, following the introduction of the VMS, did not result in denying the Applicant the right to full consideration for promotion.

5. The Secretary-General's obligation is to take a decision on the appeal. As a matter of policy, unanimous recommendations of the JAB are accepted by him if they do not impinge on matters of law or principle.

The Tribunal, having deliberated from 3 June to 24 June 1993 in Geneva and from 19 October to 19 November 1993 in New York, now pronounces the following judgement:

I. The Applicant applied for the post of Chief, Industry, Energy and Environment Statistics Branch in the Department of International Economic and Social Affairs (DIESA). The selection for the post was to be conducted under the Vacancy Management System (VMS). Consequently, the applications were considered by the Appointment and Promotion Board (APB) and a short-list which included the Applicant's name was drawn up. DIESA considered the short-list and selected a candidate who was a staff member of the International Civil Service Commission (ICSC).

II. The Applicant initiated a recourse procedure against his non-selection. Not having received an answer, he appealed to the

JAB, which recommended a month's salary as compensation on the ground that "VMS was used in this case to fill a vacancy with an external candidate, which was not in line with the goals of the VMS". The Secretary-General subsequently decided not to follow the JAB's recommendation and invoked administrative instruction ST/AI/338/Add.5, paragraph 32(a), claiming that, according to its provisions, he had authority to appoint external candidates under the VMS.

III. The Applicant, thereupon, requested the Tribunal to "find that the recruitment of an external candidate violates staff regulation 4.4". In order to dispose of this plea and of a related question raised by the Applicant, with respect to administrative instruction ST/AI/338, the Tribunal had to determine whether the former ICSC staff member was treated as an external candidate. During the proceedings, the Respondent, alternatively, claimed that he was an external and an internal candidate: external in the final decision contained in the letter of 20 November 1991 and, also, in paragraph 7 of a memorandum by Counsel for the Respondent, dated 29 October 1992: internal, on page 2 of the memorandum by Counsel for the Respondent, dated 8 June 1991. The Tribunal is of the view that, the administrative decision it is called upon to examine is contained in the above-mentioned letter, dated 20 November 1991. That letter dealt with the successful candidate as an external candidate. For that reason alone, the Tribunal will consider the case on that basis.

IV. As to the Applicant's argument that staff regulation 4.4 has not been observed, it is the Tribunal's opinion that, inasmuch as the short list submitted by the APB in compliance with the VMS, included the Applicant, as well as others in the service of the UN, the requirements of staff regulation 4.4 have been met.

Moreover, the norm invoked by the Respondent in his decision, i.e. administrative instruction ST/AI/338/Add.5, paragraph 32(a), provides for exceptions in implementing the VMS in certain cases, including the following:

> "(a) Posts requiring specialized or technical skills not present or in short supply among existing staff members. Where internal candidates are not available to fill such posts and it is determined that the posts are essential to the delivery of mandated programmes, an approval for external recruitment will have to be sought. When an approval for recruitment is granted, and external vacancy announcement will be issued and posted for which internal candidates may nevertheless apply".

Under paragraph 33 of that instruction, it is for OHRM to decide when a post falls within one of the exceptions mentioned in paragraph 32(a).

V. On 7 December 1989, the Director of the Statistical Office requested the Administrative Officer, Executive Office, DIESA, to open post UNA-06540-E-D1-001 for external recruitment, pointing out that the retirement of several staff members would otherwise "have a serious detrimental effect on the capability of the Office". In consequence, the vacancy was announced by OHRM as being open to both external and internal candidates, a decision which, in the Tribunal's view, constitutes a valid administrative measure pursuant to paragraph 33 of administrative instruction ST/AI/338/Add.5.

VI. The Applicant has also charged that favouritism was shown towards the successful candidate by the then Assistant Secretary-General, OHRM, in arranging to have the ICSC staff member considered as an internal candidate and in calling this directly to the attention of the Head of the department. The Tribunal has examined this issue closely. Although it was concerned regarding what appeared to be a last minute arrangement made by the Assistant

Secretary-General, OHRM, and the ICSC which might have been of assistance to the successful candidate, the Tribunal was unable to find that the Applicant's charge of favouritism was substantiated.

VII. The Applicant, in his pleas, requests the Tribunal to rule that: "the argument that the Applicant did not meet the requirements of Article 101, paragraph 6 of the Charter is not only totally unwarranted but also insulting to the Applicant and all other internal candidates". The Tribunal finds no basis for such a request, which should therefore be dismissed.

VIII. The Applicant further requests the Tribunal to find that he had not "received the fullest consideration with regard to [his] candidacy" for the post for which he applied. In this respect, the Tribunal recalls its Judgement No. 565, Al Atraqchi, in which it ruled that the fact that an applicant's name was included in the short-list forwarded by the APB to OHRM, clearly indicated that he or she had been fully considered. As for the final selection, the Tribunal further recalls its Judgement No. 565:

> "V. ...The VMS selection process according to ST/AI/338, is conducted in two steps: the applications are first considered by the APB and a short-list is drawn up and submitted to the head to the department concerned; then, the head of the department makes his choice. As far as the first step is concerned, detailed guidelines, to be followed by the APB, are set forth in Chapter II of ST/AI/338. Once the APB concludes its review, the decision rests with the head of the department. For this second phase, there are no guidelines. Under Chapter III of ST/AI/338, the head of the department concerned is free to choose any short-listed candidate he judges to be best qualified for the job."

IX. The Applicant also requests the Tribunal to find that "the Secretary-General's refusal to accept the unanimous report of the

JAB contradicts his commitment to accept all unanimous reports of the JAB, provided that they do not impinge on any major questions of law or principle."

In connection with this plea, the Tribunal recalls its Judgement No. 562, Al Jaff (1992), paragraph VIII, in which it ruled that:

> "In the Tribunal's view, the Secretary-General has only adopted a policy from which he can depart. Thus the relevant rules concerning the advisory nature of the JAB recommendations remain unchanged."

X. The Applicant further requests the Tribunal to rule that the representative of the Secretary-General could not rely, as he did, on administrative instruction ST/AI/338/Add.5, paragraph 32(a) when he decided not to follow the JAB's recommendations. The Applicant contends that inasmuch as this text had not been invoked before the JAB, it could not be invoked later before the Tribunal. The Tribunal is unable to share the Applicant's view on this issue. The Respondent clearly stated before the JAB in paragraph 13 of his submission, that "In accordance with paragraphs 2, 4 and 32 of ST/AI/338/Add.5, the post was advertised internally and externally".

Furthermore, even if such administrative instruction had not been invoked before the JAB, it is the Tribunal's view that the Respondent would not have been barred from invoking it at a later stage. Legal texts may be invoked before an appellate body, at any time.

XI. The Applicant also requests the Tribunal to "conclude that the selection process that awarded Mr. Osborne Jackson promotion to D-1 was null and void". In this respect, the Tribunal notes that the point at issue is not the successful candidate's promotion to the D-1 level but his selection for post UNA-06540-E-D1-001. Both exercises are closely connected but, they are still clearly

distinguishable and occurred at different times. The Applicant has challenged the selection process and it is this challenge on which the Tribunal is called upon to rule.

XII. Although the promotion of the candidate is not properly before it, the Tribunal cannot but note with great concern that it was carried out without duly observing the General Assembly's resolution 2480B, that requires "adequate and confirmed knowledge of a second language" for promotion to certain grades.

The Respondent conceded in his memorandum of 8 June 1993, that the successful candidate "did not possess a proficient knowledge of a second language at the time of his promotion to the D-1 level". He claimed that the requirement of a second language had been duly waived, according to the provisions of the General Assembly's resolution. In the Respondent's view, the mere fact of the selection of the candidate implied the waiving of the language requirement. The Tribunal does not share this view.

It appears to the Tribunal that the General Assembly resolution requires a determination by the Secretary-General (or by someone under a proper delegation of authority) that, with regard to the post in question, it is in the interest of the Organization, for specified reasons, to dispense with the second language requirement. If there is such a waiver, it should be made known, especially to all potential candidates for the post; this is not done when a vacancy announcement merely states that a second language is desirable. Although this matter does not alter the outcome of the present case, the Tribunal feels bound to invite the attention of the Respondent to the importance of properly implementing the General Assembly's resolutions.

XIII. Finally, the Applicant calls upon the Tribunal to conclude that he was the "most qualified of all candidates". In this respect, the Tribunal recalls its consistent jurisprudence and reiterates that it is beyond its competence to compare the merits of different candidates.

XIV. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Ioan VOICU
Member

New York, 19 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary